

March 3, 2005

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-01 is available for public comments under this procedure. It was requested by C. Bryant Rogers, on behalf of Mississippi Band of Choctaw Indians.

Proposed Advisory Opinion 2005-01 is scheduled to be on the Commission's agenda for its public meeting of Thursday, March 10, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on March 9, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-01, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Associate General Counsel
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999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 3, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Mai T. Dinh
Assistant General Counsel

Michael G. Marinelli
Staff Attorney

Subject: Draft AO 2005-01

Attached are two proposed drafts of Advisory Opinion 2005-01, which responds to a request from the Mississippi Band of Choctaw Indians, ("Tribe"), to determine their possible status as a Federal contractor due to the commercial activity of IKBI, Inc. ("IKBI"), a Tribal corporation.

The drafts come to different conclusions regarding the Tribe's status as a Federal contractor. Draft A concludes that due, in part, to the indemnification agreement that would make the Tribe liable for the performance bonds linked to the Federal contract, the Tribe does become a Federal contractor under 2 U.S.C. 441c. Draft B concludes that IKBI can be treated as a separate entity from the Tribe and that the commercial activity of IKBI as a Federal contractor does not confer Federal contractor status on the Tribe.

The Office of General Counsel recommends adoption of Draft A.

We request that these drafts be placed on the agenda for March 10, 2005.

Attachments

1 ADVISORY OPINION 2005-01

2
3
4 C. Bryant Rogers
5 Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP.
6 P.O. Box 1447
7 Santa Fe, NM 87504-1447
8

9 Dear Mr. Rogers:

10
11 We are responding to your advisory opinion request regarding the possible
12 Federal contractor status of the Mississippi Band of Choctaw Indians (“the Tribe”), a
13 Federally recognized Indian tribe, under the Federal Election Campaign Act of 1971, as
14 amended (“the Act”), and Commission regulations. The Tribe owns and controls IKBI,
15 Inc. (“IKBI”), a Tribal corporation that intends to become a Federal contractor. The facts
16 that the Tribe created IKBI, provided IKBI’s entire initial and supplemental
17 capitalization, elects all members of IKBI’s board of directors through another entity,
18 shares its sovereign immunity with IKBI, and will indemnify the performance of IKBI on
19 bonds it must obtain demonstrate that IKBI is not a separate and distinct entity from the
20 Tribe. Thus, the Tribe will be a Federal contractor for purposes of the Act and will be,
21 therefore, prohibited from making contributions to Federal candidates, political parties
22 and political committees, once IKBI qualifies as a Federal contractor.

23 ***Background***

24 The facts of this opinion are presented in your letter dated January 6, 2005.

25 The Tribe is a non-corporate entity organized in accordance with a constitution
26 approved in 1975 by the Secretary of the Interior pursuant to 25 U.S.C. 476. *See*

27

1 Advisory Opinion 1993-12.¹ The Tribal constitution authorizes the creation of
2 “organizations, including public and private corporations, for any lawful purpose, which
3 may be non-profit or profit making, and to regulate the activities of such organizations by
4 ordinance.” Tribal Constitution, Article VIII, section 1(j).

5 The Tribe established and chartered IKBI in June 2004 as a for-profit Tribal
6 “separate corporation.” The Tribe provided approximately \$ 468,000 in initial and
7 supplemental capitalization to IKBI. The purpose of IKBI is to “compete for and
8 perform construction contracts and any other lawful purpose consistent with [its]
9 charter.” IKBI Charter, Article VII, section A.

10 IKBI is governed by its board of directors, which is elected by its sole
11 shareholder, the Choctaw Development Enterprise (“CDE”), acting on behalf of the
12 Tribe. *Id.* at section B. CDE, in turn, is operated and managed by its five-member
13 enterprise board, which is appointed by the Tribal Council with Tribal Chief and the
14 Tribal Secretary – Treasurer serving as the enterprise board’s Chairman and Treasurer,
15 respectively.²

16 IKBI’s board of directors manages the business and affairs of the corporation;
17 however, the Tribal Council retains the authority to issue shares of the IKBI stock. *Id.* at
18 section C(9). The board has the authority to waive the sovereign immunity of the
19 corporation, but not the sovereign immunity of the Tribe or any other Tribal entity or

¹ The Commission previously concluded that the Tribe was a Federal contractor with regard to some of its contracts with the Federal government but not all. *See* Advisory Opinion 1993-12. However, in Advisory Opinion 1999-32, when looking at the relationship between the Tohono O’odham Nation and its Tribal Utility Authority, the Commission revised the analysis regarding tribal entities and Federal contractor status and superceded the portion of Advisory Opinion 1993-12 concluding that the Tribe was a Federal contractor.

² CDE was created in November 1997, to engage in residential, commercial and institutional construction. CDE is not a “separate legal entity” but is an “arm of the Tribe.” *See* Tribal ordinance No. 56.

1 enterprise. *Id.* The board elects and removes officers of the corporation and authorizes
2 the officers to enter into contracts on behalf the corporation's behalf. *Id.* at sections D(1)
3 and (3) and section F.

4 IKBI has its own tax identification number separate from that of the Tribe. It
5 maintains office space and records separate from the Tribe and has its own bank account
6 separate from the Tribe. It has its own corporate employees and personnel policies, and it
7 provides employee benefits separate from the Tribe. Finally, IKBI has separate legal
8 counsel.

9 IKBI is a construction company and most of its planned work consists of
10 construction projects for the U. S. Government or Federal agencies. IKBI intends to seek
11 both sole source and competitive bid contracts with various Federal agencies, including
12 the General Services Administration and the Federal Aviation Administration. These
13 contracts will be funded with Federally appropriated funds.

14 For all its construction projects, both Federal and non-Federal, the
15 owner/purchaser will require IKBI to obtain a standard performance bond from a
16 reputable bonding company and, in some instances, a bid bond and payment bond as
17 well. As a condition for issuing the bonds, the bonding agent will require the Tribe,
18 (through CDE as the sole stockholder of IKBI), to sign an "agreement of indemnity."
19 This obligates the Tribe (through CDE) to act as co-indemnitor (along with IKBI) for any
20 losses and liabilities on the bonds. As a startup company, IKBI has neither sufficient in-
21 house financial resources nor a sufficient proven construction track record to enable it to
22 obtain the requisite bonds on its own.

Question Presented

Will the Tribe's relationship to IKBI, including its role as co-indemnitor on bonds related to Federal contracts, make it a Federal contractor for purposes of the Act and Commission regulations?

Legal Analysis and Conclusion

Yes, based on the Tribe's relationship with IKBI, the Tribe will be a Federal contractor once IKBI qualifies as a Federal contractor.

The term "person" as defined in the Act includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. 431(11). The Tribe, which is an unincorporated entity, is a "person" under the Act. *See* Advisory Opinion 1993-12. As a corporation, IKBI is also a "person" under the Act. 2 U.S.C. 431(11).

Under 2 U.S.C. 441c, it is unlawful for any person who is a Federal contractor "directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office." *See also* 11 CFR 115.2(a). This prohibition extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 CFR 115.1(b), 115.2(b).

Under 2 U.S.C. 441c(a)(1) and Commission regulations at 11 CFR 115.1(a), a "Federal contractor" is a person who:

(1) Enters into any contract with the United States or any department or agency thereof either for—

(i) The rendition of personal services; or

(ii) Furnishing any material, supplies, or equipment; or

- 1 (iii) Selling any land or buildings;
2 (2) If the payment for the performance of the contract or payment for the material,
3 supplies, equipment, land, or building is to be made in whole or in part from
4 funds appropriated by the Congress.
5

6 Under 11 CFR 115.1(c), the term "contract" includes:

- 7 (1) A sole source, negotiated, or advertised procurement conducted by the United
8 States or any of its agencies;
9 (2) A written (except as otherwise authorized) contract, between any person and
10 the United States or any of its departments or agencies, for the furnishing of
11 personal property, real property, or personal services; and
12 (3) Any modification of a contract.
13

14 The request describes IKBI's proposed transactions with the Federal governments
15 as "contracts." For purposes of this advisory opinion the Commission assumes,
16 therefore, that these are the type of agreements described in 11 CFR 115.1(c). When
17 IKBI qualifies as a Federal contractor, 2 U.S.C. 441c and 11 CFR 115.2 will prohibit it
18 from making contributions. This advisory opinion considers whether that prohibition
19 extends to the Tribe as well.

20 In two advisory opinions the Commission has considered whether the Federal
21 contractor status of subordinate tribal enterprises limits the ability of Indian tribes to
22 make contributions. *See* Advisory Opinions 1999-32 and 1993-12. The Commission
23 concluded that if circumstances demonstrate that the tribal enterprise has a distinct and
24 separate identity from the Indian tribe itself, then the Act does not prohibit a tribe from
25 making contributions because of the Federal contractor status of the tribal enterprise. *See*
26 Advisory Opinion 1999-32.³

³ In Advisory Opinion 1999-32, the Commission determined that the Tribal Utility Authority could be treated as a separate entity from the Tohono O'odham Nation for purposes of 2 U.S.C. 441c. Among the factors considered were the separate bank accounts, employees, policies and benefits maintained by the Tribal Utility Authority. However, nothing in that advisory opinion indicated that these were the only relevant factors.

1 While some aspects of the circumstances might indicate that IKBI has an identity
2 distinct from the Tribe, such as its separate corporate structure, many more substantial
3 factors support the conclusion that the Tribe and IKBI are inextricably linked.

4 The Tribe owns and controls IKBI through CDE and provided the initial capital to fund
5 IKBI's operation. Further, IKBI enjoys the sovereign immunity that vests with the Tribe
6 as a sovereign entity, which indicates that IKBI cannot be wholly separate from the
7 Tribe.⁴ In addition, the request raises an issue not considered in Advisory Opinion 1999-
8 32 or 1993-12: whether an Indian tribe's assumption of financial liability for the Federal
9 contracts of its subordinate tribal entities defeats a distinct and separate identity for
10 purposes of the prohibitions of section 441c.

11 While this is an important distinction from Advisory Opinion 1999-32, the prior
12 opinions offer some guidance on this issue. In Advisory Opinion 1998-11, which was
13 identified in Advisory Opinion 1999-32 as "of particular relevance," a limited liability
14 holding company wholly owned two other limited liability companies that were Federal
15 contractors. The Commission determined that the holding company was legally distinct
16 from its subsidiaries and could make Federal contributions. However, this conclusion
17 was based on findings that the subsidiaries were not "merely agents, instrumentalities, or
18 alter egos" of the holding company especially in financial matters and in the performance
19 of the Federal contracts. The Commission noted that "the Government contracts entered
20 into by [the subsidiaries] do not contain clauses or terms which would hold [the holding

⁴ A subordinate tribal entity enjoys the same right of sovereign immunity in commercial matters as does the tribe that created it. See Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law*, 37 Tulsa L. Rev. 661, 702 n.199 (2002) (citations omitted); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (holding that sovereign immunity prevents Oklahoma from seeking suit to force a tribal store to collect taxes on cigarette sales). This element was not discussed in previous advisory opinions involving Tribal organizations and section 441c. See Advisory Opinions 1993-12 and 1999-32.

1 company] liable for breaches by [the subsidiaries].” This concern is raised in the current
2 request.

3 Taken together, the factors listed that emphasize the identification of IKBI with
4 the Tribe tend to outweigh the factors suggesting that they are separate and distinct. The
5 indemnification agreement is of particular significance because it emphasizes the
6 economic identification of IKBI and the Tribe for purposes of the Federal contracts. The
7 financial obligations assumed by the Tribe on behalf of IKBI create liabilities linked to
8 the Federal contract. As co-indemnitor (with IKBI) on bonds tied to the IKBI’s contract
9 bidding and performance, the Tribe is involved in the contractual obligations that lie at
10 the heart of the Federal contractor prohibitions.

11 The Commission concludes that under these circumstances the Tribe is not a
12 separate and distinct entity from IKBI for purposes of IKBI’s Federal contracts.
13 Therefore, once IKBI qualifies as a Federal contractor, 2 U.S. C. 441c will apply to the
14 Tribe and IKBI equally. Accordingly, section 441c will prohibit the Tribe from making
15 contributions to Federal candidates, political parties and committees during the term of
16 IKBI’s Federal contracts.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestor may not rely on that

1 conclusion as support for its proposed activity.

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Sincerely,

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Scott E. Thomas

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Chairman

10

11 Enclosures (Advisory Opinions 1999-32, 1998-11, and 1993-12)

1 ADVISORY OPINION 2005-01

2
3
4 C. Bryant Rogers
5 Roth, VanAmberg, Rogers, Ortiz & Yepa, LLP.
6 P.O. Box 1447
7 Santa Fe, NM 87504-1447
8

9 Dear Mr. Rogers:

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11 We are responding to your advisory opinion request regarding the possible
12 Federal contractor status of the Mississippi Band of Choctaw Indians (“the Tribe”), a
13 Federally recognized Indian tribe, under the Federal Election Campaign Act of 1971, as
14 amended (“the Act”), and Commission regulations. The Tribe owns and controls IKBI,
15 Inc. (“IKBI”), a Tribal corporation that intends to become a Federal contractor.

16 The facts indicate that IKBI can be treated as a separate entity from the Tribe and
17 that the commercial activity of IKBI as a Federal contractor can be separated from the
18 Tribe’s political activities. IKBI’s status as a Federal contractor will not make the Tribe a
19 Federal contractor for purposes of the Act, and will not affect the Tribe’s ability to make
20 contributions to Federal candidates, political parties and political committees.

21 ***Background***

22 The facts of this opinion are presented in your letter dated January 6, 2005.

23 The Tribe is a non-corporate entity organized in accordance with a constitution
24 approved in 1975 by the Secretary of the Interior pursuant to 25 U.S.C. 476. *See*

1 Advisory Opinion 1993-12. The Tribal constitution authorizes the creation of
2 “organizations, including public and private corporations, for any lawful purpose, which
3 may be non-profit or profit making, and to regulate the activities of such organizations by
4 ordinance.” Tribal Constitution, Article VIII, section 1(j).

5 The Tribe established and chartered IKBI in June 2004 as a for-profit Tribal
6 “separate corporation.” The Tribe provided approximately \$ 468,000 in initial and
7 supplemental capitalization to IKBI. The purpose of IKBI is to “compete for and
8 perform construction contracts and any other lawful purpose consistent with [its]
9 charter.” IKBI Charter, Article VII, section A.

10 IKBI is governed by its board of directors, which is elected by its sole
11 shareholder, the Choctaw Development Enterprise (“CDE”), acting on behalf of the
12 Tribe. *Id.* at section B. CDE, in turn, is operated and managed by its five-member
13 enterprise board, which is appointed by the Tribal Council with Tribal Chief and the
14 Tribal Secretary – Treasurer serving as the enterprise board’s Chairman and Treasurer,
15 respectively.¹

16 IKBI’s board of directors manages the business and affairs of the corporation;
17 however, the Tribal Council retains the authority to issue shares of the IKBI stock. *Id.* at
18 section C(9). Board members must be members of the Tribe, but no member of the
19 Tribal Council may serve on the board. *Id.* at section(C)(1). The board has the authority
20 to waive the sovereign immunity of the corporation, but not the sovereign immunity of
21 the Tribe or any other Tribal entity or enterprise. *Id.* at section C(9). The board elects

¹ CDE was created in November 1997, to engage in residential, commercial and institutional construction. CDE is not a “separate legal entity” but is an “arm of the Tribe.” *See* Tribal ordinance No. 56.

1 and removes officers of the corporation and authorizes the officers to enter into contracts
2 on behalf the corporation's behalf. *Id.* at sections D(1) and (3) and section F.

3 IKBI has its own tax identification number separate from that of the Tribe. It
4 maintains office space and records separate from the Tribe and has its own bank account
5 separate from the Tribe. You state that IKBI leases or owns its own property. It has its
6 own corporate employees and personnel policies, and it provides employee benefits
7 separate from the Tribe. Finally, IKBI has separate legal counsel.

8 IKBI is a construction company and most of its planned work consists of
9 construction projects for the U. S. Government or Federal agencies. IKBI intends to seek
10 both sole source and competitive bid contracts with various Federal agencies, including
11 the General Services Administration and the Federal Aviation Administration. These
12 contracts will be funded with Federally appropriated funds.

13 For all its construction projects, both Federal and non-Federal, the
14 owner/purchaser will require IKBI to obtain a standard performance bond from a
15 reputable bonding company and, in some instances, a bid bond and payment bond as
16 well. As a condition for issuing the bonds, the bonding agent will require the Tribe,
17 (through CDE as the sole stockholder of IKBI), to sign an "agreement of indemnity."
18 This obligates the Tribe (through CDE) to act as co-indemnitor (along with IKBI) for any
19 losses and liabilities on the bonds. As a startup company, IKBI has neither sufficient in-
20 house financial resources nor a sufficient proven construction track record to enable it to
21 obtain the requisite bonds on its own.

Question Presented

Will the Tribe's relationship to IKBI, including its role as co-indemnitor on bonds related to Federal contracts, make it a Federal contractor for purposes of the Act and Commission regulations?

Legal Analysis and Conclusion

No, because of IKBI's distinct and separate identity from the Tribe, the status of IKBI as a Federal contractor, even within the context of the indemnification agreement, does not make the Tribe a Federal contractor.

The term "person" as defined in the Act includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. 431(11). The Tribe, which is an unincorporated entity, is a "person" under the Act. *See* Advisory Opinion 1993-12. As a corporation, IKBI is also a "person" under the Act. 2 U.S.C. 431(11).

Under 2 U.S.C. 441c, it is unlawful for any person who is a Federal contractor "directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office." *See also* 11 CFR 115.2(a). This prohibition extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 CFR 115.1(b), 115.2(b).

Under 2 U.S.C. 441c(a)(1) and Commission regulations at 11 CFR 115.1(a), a "Federal contractor" is a person who:

(1) Enters into any contract with the United States or any department or agency thereof either for—

- 1 (i) The rendition of personal services; or
- 2 (ii) Furnishing any material, supplies, or equipment; or
- 3 (iii) Selling any land or buildings;
- 4 (2) If the payment for the performance of the contract or payment for the material,
- 5 supplies, equipment, land, or building is to be made in whole or in part from
- 6 funds appropriated by the Congress.
- 7

8 Under 11 CFR 115.1(c), the term "contract" includes:

- 9 (1) A sole source, negotiated, or advertised procurement conducted by the United
- 10 States or any of its agencies;
- 11 (2) A written (except as otherwise authorized) contract, between any person and
- 12 the United States or any of its departments or agencies, for the furnishing of
- 13 personal property, real property, or personal services; and
- 14 (3) Any modification of a contract.
- 15

16 The request describes IKBI's proposed transactions with the Federal governments
17 as "contracts." For purposes of this advisory opinion the Commission assumes,
18 therefore, that these are the type of agreements described in 11 CFR 115.1(c). When
19 IKBI qualifies as a Federal contractor, 2 U.S.C. 441c and 11 CFR 115.2 will prohibit it
20 from making contributions. This advisory opinion considers whether that prohibition
21 extends to the Tribe as well.

22 In two advisory opinions the Commission has considered whether the Federal
23 contractor status of subordinate tribal enterprises limits the ability of Indian tribes to
24 make contributions. *See* Advisory Opinions 1999-32 and 1993-12. The Commission
25 concluded that if circumstances demonstrate that the tribal enterprise has a distinct and
26 separate identity from the Indian tribe itself, then the Act does not prohibit a tribe from
27 making contributions because of the Federal contractor status of the tribal enterprise. *See*
28 Advisory Opinion 1999-32.

29 The facts in this request are substantially similar to the facts considered in
30 Advisory Opinion 1999-32. As in Advisory Opinion 1999-32, circumstances indicate

1 that IKBI is a separate and distinct entity from the Tribe. These include the separate
2 incorporation of IKBI, the separate leasing and ownership of property, the fact that no
3 member of the Tribal council may serve on the IKBI board, and that IBKI has a separate
4 legal counsel, bank account, tax identification number and separate employees, personnel
5 and benefit policies from the Tribe. Further, as in Advisory Opinion 1999-32, funds from
6 the Tribal enterprise that is a Federal contractor are not intermingled with other Tribal
7 funds. The Commission notes that revenues from IKBI may not be used to make
8 contributions to Federal candidates or political committees.

9 Accordingly, when IKBI qualifies as a Federal contractor, its status as Federal
10 contractor does not confer Federal contractor status on the Tribe and therefore will not
11 affect the Tribe's political activities under 2 U.S.C. 441c. The Tribe may continue to
12 make contributions as a "person" under the Act subject to the condition that revenues
13 from IKBI may not be used to fund these contributions. *See* Advisory Opinion 1999-32.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any
17 of the facts or assumptions presented, and such facts or assumptions are material to a
18

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity.

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Sincerely,

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Scott E. Thomas

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Chairman

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12 Enclosures (Advisory Opinions 1999-32, 1998-11, and 1993-12)